IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

IN RE: FLATT, Jerrold V.	)
	) **APPEAL NO. _____**
SERIAL NO: 09/992,764	)
	)
FOR: SOFTWARE ARTICLE, SYSTEM AND METHOD FOR PHYSICIAN REFERRAL SERVICES	)) **REPLY BRIEF ON APPEAL**)
	)
FILED: November 6, 2001	)
	)
GROUP ART UNIT: 3626	)

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JEFFREY D. HARTY

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I. REAL PARTY IN INTEREST

The applicant is the real party in interest in this appeal.

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

Claims 1-3, 5-18, 20-23, and 25 stand rejected under 35 U.S.C. § 103(a). Claims 1-3, 5-18, and 20-23 are rejected under § 103(a) as obvious over Filler in view of Bianco et al. and further in view of Kiselik. Claim 25 is rejected under § 103(a) as obvious over Filler in view of Bianco et al. All rejections are being appealed, and accordingly claims 1-3, 5-18, 20-23, and 25 are on appeal.

IV. STATUS OF AMENDMENTS

No amendments were filed after final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 1 is directed toward a method of managing patient referrals between health care providers. The method includes providing a web site accessible to a plurality of health care providers, receiving through the web site a plurality of health care provider registrations, each associated with a health care provider, receiving a request for a patient consultation from a first health care provider to be performed by a second health care provider, both the first health care provider and the second health care provider having a health care provider registration, notifying the second health care provider of the request for a patient consultation according to a preferred mode of communication setting set by the second health care provider on the web site, and receiving a peer rating from the first health care provider of the second health care provider. *See* Specification, p. 6, l. 23 – p. 7, l. 24; p. 20, ll. 2-16.

Independent claim 18 is directed toward a system for managing patient referrals. The method includes a web site accessible to a plurality of health care providers, at least one registration web page within the web site to allow each of the plurality of health care providers to register to become registered health care providers, an inbox within the web site associated with at least one of the registered health care providers and containing at least one request for a patient consult made to the at least one of the registered health care providers, an outbox within the web site associated with the at least one of the registered health care providers and containing at least one request for a patient consult made by the at least one of the registered health care providers, a peer review component for providing feedback related to a patient consult by a consulting health care provider from a referring health care provider, and a mode of communication preference set by a referring health care provider and provided to a consulting health care provider. *See* Specification, p. 6, l. 23 – p. 7, l. 24; p. 13, l. 22 – p. 14, l. 4; p. 20, ll. 2-16; Fig 7B.

Independent claim 25 is also directed toward a method of managing patient referrals. The method includes providing a web site accessible to a plurality of health care providers, the plurality of health care providers including a referring physician and a consulting physician, receiving a request on the web site from the referring physician for a patient consultation to be performed by the consulting physician on a patient, notifying the consulting physician of the request for a patient consultation, requesting an authorization number for the patient consultation from an insurer providing insurance to the patient, wherein the step of notifying the consulting physician is notifying the consulting physician according to a preferred mode of communications setting set by the consulting physician on the web site. *See* Specification, p. 6, l. 23 – p. 7, l. 24; p. 13, l. 22 – p. 14, l. 4; Fig. 7B.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A. Whether claims 1-3, 5-18, 20-23, and 25 were improperly rejected under 35 U.S.C. § 103(a) based in part on the Bianco et al. reference?

B. Whether claims 1-3, 5-18, and 20-23 were improperly rejected under 35 U.S.C. § 103(a) based in part on the Kiselik reference?

C. Whether claims 1-3, 5-18, 20-23, and 25 were improperly rejected under 35 U.S.C. § 103(a) based in part on the Filler reference?

VII. ARGUMENT

A. The Relied-Upon Portions of the Filler Reference are not Supported by Filler's Priority Document, and Therefore are not Prior Art to Applicant

In the Examiner's answer, he asserts that various portions of Filler's provisional application (Serial No. 60/171,446) provide sufficient support for the portions of the Filler reference (U.S. Publication No. 2001/0051881) relied upon in the Examiner's rejection. In examination of the passages of the cited passages reveals this is not the case, and as a result Filler is not prior art to the instant application.

The Examiner first states that the disclosure of "both the referring and the referred physician are registered with the web site" is satisfied by the provisional application statement that "a managing medical entity (MME) assigns the patient to a contracted imaging center" (i.e., second physician). Examiner's Answer, page 21. The Examiner asserts that the term "contracted" indicates that the imaging center is registered into the system. Examiner's Answer, page 21. This simply reads disclosure into Filler that is not there.

As an initial matter, there is nothing in Filler that indicates physicians are present at the imaging center, as frequently imaging services are performed by technologists rather than physicians. This is further supported by Filler itself, which notes that "the complete file of image data and post-processed images are then transmitted through a separate network to distribute the data to an employed or contracted reader with appropriate credentials who carries out a radiological image interpretation." Filler priority document, page 2. This indicates, as contemplated by Filler, physicians are not present at the imaging center, otherwise there would be no reason to transmit the images to a "reader with appropriate

credentials," i.e., a second physician. Examiner's reading of Filler is therefore not consistent with the text.

Further, there is also no indication that a "contracted" entity is registered with the web site. This is simply disclosure invented by the Examiner to fill in the gap pointed out in Applicant's Appeal Brief. Even assuming that the "imaging center" comprises a second physician, as the Examiner points out in his answer, it is described as a "contracted" entity rather than an "enrolled" entity. According to Filler's priority document, it is only "enrolled referring physicians" who "have secure access to the physician web site system via a public key encryption system using Virtual Private Network (VPN) software." Filler priority document, page 1. Thus, Filler's disclosure actually shows that the imaging center is not registered with the web site. Thus, Filler's priority document does not disclose this element.

Similarly, with regard to the "notifying the second healthcare provider of a request for a patient consultation" element, the Examiner erroneously equates the imaging center with a "second healthcare provider." Examiner's Answer, page 21. In actuality, to the extent Filler's priority document discloses a second healthcare provider, that second healthcare provider is not the imaging center, but instead would be the "employed or contracted reader with appropriate credentials" who actually reads the images taken at the imaging center, as described above. Filler priority document, page 2. The Examiner's assertion that the imaging center equates with the second healthcare provider is simply incorrect based on a full reading of Filler.

Regarding the "demographic data" limitation, the Examiner mistakenly equates demographic data with the identity of the patient. Examiner's Answer, page 22. Demographic data is statistical characteristics of the patient, such as race, gender, age, etc., as opposed to the identity of the patient, which provides none of this information. Nowhere is such a disclosure even contemplated in the Filler priority document. This is once again simply an instance of the Examiner inventing disclosure in Filler's priority document that is simply not present.

Regarding the "communications with insurance companies" limitation, there is simply no disclosure in Filler's priority document that demonstrates that the inventor had possession of the invention as of Filler's provisional filing date. The Examiner asserts that "generating appropriate billing and data tracking information for all data transmissions, received, transformations, and provisions of medical services" is sufficient support for "the natural next step of sending billing information to the appropriate paying entity (i.e., insurance companies). Examiner's Answer, page 22.

The disclosure in Filler's priority document simply does not support this conclusion. Nowhere in the disclosure is the word "insurance" even used. Furthermore, claim 8, the portion cited by the Examiner, provides no detail whatsoever regarding any communications with insurance companies at all, instead just reciting "generating appropriate billing and data tracking information for all data transmissions." This appears to actually be a reference to the transmission of, for example, the imaging data described in the Specification of the Filler priority document discussed previously. To read this as providing sufficient § 112 support for communications with insurance companies simply overstates Filler's disclosure.

Finally, with regard to the "appointment preference information" limitation, the Examiner states that because the patient contacts an imaging center or the imaging center contact the patient and schedules the patient for an appointment, that "appointment preferences of both the patient and imaging center are inherently supported by this disclosure." Examiner's Answer, page 22. Once again, this simply reads disclosure that is not there. There is no evidence that one of ordinary skill in the art would understand that by simply contacting the patient and scheduling an appointment, that appointment preferences of both patient and imaging center are disclosed.

Accordingly, nothing in the Examiner's answer changes the fact that Filler is not effective prior art for the grounds of rejection asserted by claims 1-3, 5-18, 20-23 and 25. As a result, these rejections are improper and should be reversed, and these claims are submitted to be in condition for allowance.

B. Nothing in Examiner's Answer Changes the Fact that Kiselik is not Legal Prior Art to Applicant Under § 102(e) Because its Priority Document Does Not Support the Portions Used in the Examiner's Rejection

In his answer, the Examiner states that because Kiselik's priority document discloses peer rating of parties involving a transaction in the context of e-commerce, that this provides sufficient written description support for claims or disclosure regarding peer rating of a healthcare provider. This is simply incorrect. There is simply no indication that Kiselik even contemplated peer reviews outside the context of a buyer and seller in an e-commerce transaction. Nowhere in Kiselik's priority document is the medical referral context, or the larger field of healthcare, even mentioned.

This is further supported by the fact that Kiselik is styled as a continuation-in-part application of its priority document. This indicates that Kiselik himself understood that there was insufficient written description or other support in the priority document for the application publication cited by the Examiner in his rejection. There is simply no basis for the Examiner's assertion that disclosure of rating a buyer or seller in Kiselik's priority document indicates that Kiselik even contemplated, let alone had possession of, applying a peer-review system to a physician referral application.

The Examiner also in response to this argument provides a paragraph regarding a motivation to modify or combine aspects of different prior art references. This has nothing to do with whether Kiselik is entitled to the priority date of its priority application, and should be ignored.

Accordingly, all rejections based in whole or in part on Kiselik are improper and should be reversed, and claims 1-3, 5-18, and 20-23 are in condition for allowance for this reason as well.

C. The Examiner's Interpretation of the "Preferred Mode of Communications" Limitation is not Reasonable

Finally, the Examiner defends his rejections based on Bianco et al. on the basis that the "preferred mode of communications" limitation encompasses an individual entering a

"daytime telephone number" or "an evening telephone number" or an "e-mail address". Examiner's Answer, page 18. This construction of the claim ignores the claim's context, and thus is unreasonable. Specifically, independent claims 1, 18, and 25 require that the "preferred mode of communications" be a "setting set by the" healthcare provider. This is illustrated in, for example, Figure 6A, where the physician is permitted to check a box next to entries such as "facts," "pager," or "e-mail" to indicate which of these modes of communication is preferred. This is similarly illustrated in Figure 6C.

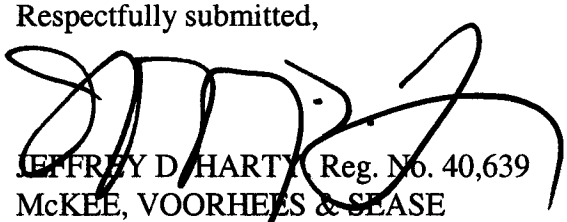
In contrast, Bianco's disclosure is analogous to that illustrated in Figure 3, where the physician enters a list of possible contact information into the referral system. This is not setting a preferred mode of communication, but rather disclosing possible modes of communication. This shows that the Examiner's interpretation of this claim limitation is not the broadest reasonable interpretation, but is instead, an unreasonable interpretation. See, e.g., In re Buszard, Slip Op. at 4 (Fed. Cir. Sept. 27, 2007). Accordingly, because this interpretation of the claim is not reasonable, and when a reasonable interpretation of the claim is applied, it is undisputed that Bianco does not teach the "preferred mode of communications" limitation, the rejection of claims 1-3, 5-18, 20-23 and 25 are improper and should be reversed.

VIII. CONCLUSION

As stated in the foregoing, the claims on appeal are not obvious under 35 U.S.C. § 103(a). Neither the Filler reference nor the Kiselik references are prior art to the instant application, and, when given the broadest reasonable interpretation, the claims are not obvious in light of Bianco.

Accordingly, it is respectfully submitted that the Examiner's rejections should be reversed, and the pending claims are in condition for allowance.

Respectfully submitted,



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